

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BEHR PROCESS CORP.,	) NO. C01-0467C
	)
Plaintiff,	) <b>PLAINTIFF BEHR'S MOTION TO</b>
	) <b>COMPEL PRODUCTION OF</b>
vs.	) <b>PRIVILEGE LOGS BY AISLIC AND</b>
	) <b>ZURICH</b>
BULLIVANT HOUSER BAILEY, P.C.;	)
JOHNSON CHRISTIE ANDREWS &	) NOTED ON MOTION CALENDAR:
SKINNER, P.S.; RICHARD L. MARTENS	) FEBRUARY 13, 2004
AND JANE DOE MARTENS and the marital	) WITHOUT ORAL ARGUMENT
community thereof; and E. PENNOCK	)
GHEEN and JANE DOE GHEEN and the	)
marital community thereof,	)
	)
Defendants.	)

**I. INTRODUCTION**

Plaintiff Behr Process Corp. ("Behr") has tried for over five months to obtain privilege logs for subpoenaed documents that Behr's insurers, American International Specialty Lines Insurance Company ("AISLIC") and Zurich Insurance Company ("Zurich"), are withholding or have redacted. Behr's efforts have been unsuccessful. Therefore, Behr respectfully requests that the Court compel AISLIC and Zurich to provide privilege logs sufficient to enable Behr to determine whether AISLIC and Zurich's withholding of, and redactions to, the subpoenaed documents are permissible.

## II. FACTS

### A. **Factual Background**

This lawsuit involves legal malpractice and other claims brought by Behr against its attorneys in Smith et al. v. Behr Process Corp., Washington Superior Court, Grays Harbor County, Cause No. 98-2-00635-4 (the "Smith lawsuit"), a class action. In that case, a default judgment was entered against Behr on liability based on alleged discovery abuses. Subsequently, based in part on the default judgment, an adverse jury verdict awarding damages to the representative class members and an order awarding treble damages and attorneys' fees was entered against Behr. This judgment was affirmed on appeal, Smith v. Behr Process Corp., 54 P.3d 665 (Wash. App. 2002). The Smith lawsuit was then settled for an amount up to \$67.5 million, with Behr's insurers' input (including AISLIC and Zurich), while Behr's Petition for Review to the Washington Supreme Court was pending.

In the months following entry of default judgment by the Smith trial court, Behr also was sued in several national and state-wide putative class actions related to, and precipitated by, the result in Smith. Those cases were also eventually settled as a nationwide class action with input from Behr's insurers, including AISLIC and Zurich. In the present lawsuit, Behr alleges, inter alia, that Defendants, who were appointed to defend Behr in the Smith lawsuit by Behr's insurers including AISLIC and Zurich, failed to adequately advise Behr in discovery matters, concealed from Behr their conflicts of interest arising out of their understandings with Behr's insurers, and otherwise provided Behr with a grossly inadequate defense.

### B. **Behr Subpoenas AISLIC And Zurich's Documents And The Insurers Respond By Producing No Documents Or Privilege Log**

On July 8, 2003, more than six months ago, Behr served AISLIC and Zurich each with a subpoena commanding production of documents for inspection and copying. See Declaration of Brian W. Grimm in Support of Plaintiff's Motion to Compel ("Grimm Declaration"), filed concurrently, at 5 (Plaintiff's Subpoena In A Civil Case To AISLIC) and 10 (Plaintiff's

1 Subpoena In A Civil Case To Zurich). AISLIC and Zurich's production of documents were due  
 2 on July 21, 2003. See Grimm Declaration at 5 (Plaintiff's July 8, 2003 Subpoena In A Civil  
 3 Case to AISLIC) and 10 (Plaintiff's July 8, 2003 Subpoena In A Civil Case To Zurich). The  
 4 subpoenas each have three document requests. Document Request Number 2 (hereinafter  
 5 "Request No. 2"), the subject of this Motion, required AISLIC and Zurich to:

6 Produce each and every document within your possession, custody, or control,  
 7 which relates to your relationship with any of the law firms or attorneys retained  
 8 by you to represent Behr Process Corporation in Truax v. Behr and/or Smith v.  
Behr, namely, Bullivant Houser Bailey, P.C., Johnson Christie Andrews &  
 Skinner, P.S., Richard L. Martens, and E. Pennock Gheen.

9 See Grimm Declaration at 5 (Plaintiff's July 8, 2003 Subpoena In A Civil Case to AISLIC) and  
 10 10 (Plaintiff's July 8, 2003 Subpoena In A Civil Case To Zurich).

11 On or about July 21, Behr was served with AISLIC and Zurich's objections to the  
 12 subpoenas. See Grimm Declaration at 15 (Objection To Subpoena Of American International  
 13 Specialty Lines Insurance Company, Fed. R. Civ. Pro. 45(c)(2)(B)) and 23 (Objection To  
 14 Subpoena Of Zurich Insurance Company, Fed. R. Civ. Pro. 45(c)(2)(B)). Neither AISLIC nor  
 15 Zurich produced documents at that time, nor did either of them produce privilege logs  
 16 identifying documents being withheld.

### 17 C. Behr, AISLIC, and Zurich Conduct A Rule 37 Conference

18 On August 12, Behr's counsel wrote to AISLIC and Zurich's counsel scheduling a Rule  
 19 37 conference for August 27, to discuss the objections. See Grimm Declaration at 34 (Schwab's  
 20 Aug. 12 Ltr.). Behr's counsel urged Zurich and AISLIC to produce documents not covered by  
 21 valid objections and to provide a log of documents being withheld. Id.

22 On August 14, Zurich's counsel agreed to the August 27 conference, but refused to  
 23 consider production of documents without a protective order, and refused to produce a privilege  
 24 log before the August 27 conference. See Grimm Declaration at 36 (King's Aug. 14. Ltr.).  
 25 Behr's counsel responded by urging Zurich again to log documents being withheld based on

1 privilege and to assemble and produce Zurich's Traux v. Behr and Smith v. Behr claim files. See  
2 Grimm Declaration at 38 (Schwab's Aug. 18 Ltr.) ("The subpoena was quite specific. You know  
3 that you are required to log whatever is withheld on the basis of privilege."). On August 18,  
4 AISLIC's counsel agreed to the August 27 conference, but refused to consider production of  
5 documents without a protective order, and rejected Behr's request for a privilege log. See  
6 Grimm Declaration at 39 (Handler's Aug. 18 Ltr.) ("Your request for privilege log is  
7 inappropriate in light of the detailed information contained in the AISLIC Objection to Subpoena  
8 document . . .").

9 On August 27, counsel for Behr, AISLIC, and Zurich held a Rule 37 conference  
10 regarding the three document requests in the subpoenas, objections to the document requests, and  
11 a protective order. On August 28, Behr's counsel wrote AISLIC and Zurich's counsel to confirm  
12 their understanding regarding each of the three document requests. See Grimm Declaration at 41  
13 (Schwab's Aug. 28 Ltr.). Under Request No. 2, Behr's counsel indicated that while Behr did not  
14 expect AISLIC and Zurich to produce documents protected by the attorney-client privilege or  
15 work product doctrine that belong to other clients of the defendant attorneys, Behr did expect  
16 AISLIC and Zurich to produce documents that relate to the business relationship between the  
17 insurers and defendant law firms. See id. Behr's counsel also indicated that a protective order  
18 was being drafted to cover these documents. Based on Behr's understanding, AISLIC's counsel  
19 agreed to produce documents two weeks after the conference, subject to a protective order, and  
20 Zurich agreed to produce documents within two weeks following the protective order. Id.

21 On August 28, AISLIC's counsel wrote to confirm their understanding of the three  
22 document requests. See Grimm Declaration at 43 (Jones' Aug. 28 Ltr.). As to Request No. 2,  
23 AISLIC's counsel indicated that he would contact Behr's counsel in one week regarding what  
24 categories of documents he would recommend that AISLIC produce.

25 On September 2, Zurich's counsel agreed to discuss with his client the documents

1 pertaining to Request No. 2, and stated a reasonable and appropriate effort would be made to  
2 produce documents his client agreed to produce within two weeks of entry of a protective order.  
3 See Grimm Declaration at 46 (King's Sept. 2 Ltr.). On September 5, AISLIC's counsel agreed  
4 to produce, under Request No. 2, letters of understanding regarding fee agreements between  
5 defendants and AISLIC, litigation guidelines sent by AISLIC to defendants applying to cases  
6 such as Smith and Truax, and materials sent by defendants to AISLIC regarding appointments to  
7 the casualty defense panel. See Grimm Declaration at 47 (Jones' Sept. 5 Ltr.).

8 **D. AISLIC and Zurich Produce Documents But No Privilege Logs**  
9 **For Withheld or Redacted Material**

10 Zurich and AISLIC subsequently produced some documents, on or about October 28 and  
11 November 6, respectively. However, neither Zurich nor AISLIC provided Behr with a privilege  
12 log or other writing to enable Behr to contest the insurers' withholding of, or redactions to,  
13 responsive documents.

14 **E. Behr Requests a Privilege Log For A Second Time But AISLIC's**  
15 **Counsel Asserts That It Has No Duty To Provide A Log**

16 On December 5, Behr's counsel e-mailed AISLIC and Zurich's counsel requesting a  
17 privilege log, stating, "Please advise when we can expect a privilege log for whatever you  
18 withheld from the material produced in response to the subpoenas from Behr." See Grimm  
19 Declaration at 49 (Schwab's Dec. 5 E-mail).

20 In response to Behr's request for a privilege log, on December 30, AISLIC's counsel  
21 refused to produce a log asserting, "What you have asked for is not a duty imposed on AISLIC  
22 by Rule 45(d) of the Federal Rules of Civil Procedure. My client is in compliance with any and  
23 all of its duties pursuant to Rule 45(d)." See Grimm Declaration at 50 (Handler's Dec. 30 Ltr.).  
24 AISLIC's counsel also claimed Behr's request for a privilege log was "unduly burdensome, or  
25 otherwise improperly fails to correspond to the issues in [this case]." Id.

On January 5, AISLIC's counsel proposed to supply a "supplemental 'log' of the bases

1 for redaction on each one of the documents AISLIC produced with portions redacted.” AISLIC  
2 did not, however, propose to supply a privilege log for withheld documents or redactions. See  
3 Grimm Declaration at 52 (Handler’s Jan. 5 Ltr.). Zurich never responded to Behr’s December  
4 5th request for a privilege log. See Grimm Declaration at 54 (Schwab’s Jan. 7 Ltr.).

5 **F. Behr Requests A Privilege Log For A Third Time**

6 On January 7, Behr’s counsel wrote to AISLIC and Zurich’s counsel:

7 On behalf of Behr, we reiterate our request that you comply with Rule 45(d)(2)  
8 for *everything* subject to the subpoena for which you have withheld on a claim  
9 that it is privileged or not subject to protection as trial preparation material. Mike  
10 Handler’s proposal yesterday to log the few items redacted from the AISLIC  
11 production is insufficient and rejected. Without your clients’ full compliance with  
12 Rule 45(d)(2), it is impossible for Behr to determine whether and to what extent  
your clients have complied with the subpoena, what has been withheld, on what  
basis and whether to contest your claims of privilege. Just as your clients are  
entitled to assert privileges, Behr is entitled to contest their claims, which really  
cannot be done effectively unless your clients comply with Rule 45(d)(2).

13 See Grimm Declaration at 55 (Schwab’s Jan. 7 Ltr.) (emphasis in original). In response,  
14 Zurich’s counsel agreed to provide a “supplemental log” identifying the basis for any redaction  
15 only for documents Zurich produced, but refused Behr’s request for a privilege log of all  
16 withheld materials finding Behr’s “unqualified request for a privilege log with respect to all  
17 matters withheld from production to be unconscionable.” See Grimm Declaration at 56 (King’s  
18 Jan. 7 Ltr.).

19 **G. Behr, AISLIC, and Zurich’s Counsel Conduct A Second Rule**  
20 **37 Conference, Specifically Regarding Behr’s Repeated**  
**Privilege Log Requests**

21 On January 9, Behr’s counsel wrote to AISLIC and Zurich’s counsel again requesting a  
22 privilege log for withheld material and inquiring whether AISLIC and Zurich’s counsel would  
23 like to hold a Rule 37 conference on the subject. See Grimm Declaration at 58 (Schwab’s Jan. 9  
24 Ltr.). AISLIC’s counsel responded by agreeing to a Rule 37 Conference. See Grimm  
25

1 Declaration at 59 (Jones' Jan. 13 Ltr.). On January 13, Behr's counsel outlined a proposal for  
2 compromise in advance of the Rule 37 conference: 1) the time period covered by the privilege  
3 log would commence with the filing of Smith and end with the Bullivant firm's withdrawal on  
4 April 10, 2001; 2) Behr would agree for present purposes to allow AISLIC and Zurich to lump  
5 coverage-related documents responsive to Request No. 1 under one category on a privilege log,  
6 stating they have been withheld, without reference to dates or particulars; and 3) log everything  
7 else that had not been produced as required by Rule 45(d)(2). See Grimm Declaration at 61  
8 (Schwab's Jan. 13 Ltr.).  
9

10 On January 15, counsel for Behr, AISLIC, and Zurich conducted a Rule 37 Conference  
11 regarding production of a privilege log. After the conference, Behr's counsel wrote to AISLIC  
12 and Zurich's counsel confirming the substance of the conference. See Grimm Declaration at 63  
13 (Schwab's Jan. 20 Ltr.). As a result of the conference, AISLIC and Zurich agreed to provide a  
14 privilege log for documents under Request No. 1 by February 6, 2004, lumping coverage related  
15 documents under one category stating they have been withheld. AISLIC and Zurich also  
16 confirmed that under Request No. 3 all litigation guidelines had been produced. Id.  
17

18 Behr, AISLIC and Zurich reached impasse, however, under Request No. 2. Id. Behr  
19 requested that AISLIC and Zurich log all documents withheld, and the insurers refused. Even  
20 after the January 15th Rule 37 Conference, AISLIC and Zurich have continued to refuse to  
21 provide privilege logs. See Grimm Declaration at 65 (Jones' Jan. 21 Ltr.); 69 (King's Jan. 22  
22 Ltr.); 71 (Schwab's Jan. 22 Ltr.).  
23  
24  
25



### III. ARGUMENT

#### A. **AISLIC and Zurich Must Produce A Description of Materials Withheld Under Document Request No. 2 Because Behr Is Entitled To Information Sufficient To Contest The Basis For Privilege Claims**

The party asserting a claim of privilege has the burden of making a *prima facie* showing that the privilege applies to a given set of documents or communications. See In re: Grand Jury Investigation United States of America v. The Corporation, 974 F.2d 1068, 1071 (9th Cir. 1992) (“In essence, the party asserting the privilege must make a *prima facie* showing that the privilege protects the information the party intends to withhold.”). Federal Rule of Civil Procedure 45(d) mandates the duty on the withholding party to make this showing in the subpoena context:

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Fed. R. Civ. Pro. 45(d)(2); In re Grand Jury Subpoena, 274 F.3d 563, 575 (1st Cir. 2001) (“The operative language is mandatory . . . .”). Although Rule 45(d)(2) does not articulate what description is “sufficient to enable the demanding party to contest the claim,” federal courts have consistently held that Rule 45(d)(2) requires the party withholding material to produce a document index or privilege log. See In re Grand Jury Subpoena, 274 F.3d at 575 (“[C]ourts consistently have held that the rule requires a party resisting disclosure to produce a document index or privilege log.”); Avery Dennison Corp v. Four Pillars, 190 F.R.D. 1, 1 (D.D.C. 1999) (describing privilege logs as “the universally accepted means of asserting privileges in discovery in the federal courts”).



1 A claim of attorney-client privilege in the Ninth Circuit must demonstrate the  
2 communication meets eight required elements:

3 (1) Where legal advice of any kind is sought (2) from a professional legal  
4 adviser in his capacity as such, (3) the communications relating to that purpose,  
5 (4) made in confidence (5) by the client, (6) are at his instance permanently  
6 protected (7) from disclosure by himself or by the legal adviser, (8) unless the  
7 protection be waived.

8 Fischel v. Margolis, 557 F.2d 209, 211 (9th Cir. 1977); see In re: Grand Jury Investigation, 974  
9 F.2d at 1070 (holding that to meet the burden showing privilege applies, “a party must  
10 demonstrate that its documents adhere to the essential elements of the attorney-client privilege  
11 adopted by this court” (citing Fischel, 557 F.2d at 496)). In this Circuit, the withholding party  
12 has a number of means of establishing the eight elements, including producing a privilege log or  
13 providing the Court with documents for in camera review. Dole v. Milonas, 889 F.2d 885, 890  
14 (9th Cir. 1989). Under the Dole-standard, privilege logs are sufficient to assert a claim of  
15 privilege if the withholding party identifies:

16 (a) the attorney and client involved, (b) the nature of the document, (c) all persons  
17 or entities shown on the document to have received or sent the document, (d) all  
18 persons or entities known to have been furnished the document or informed of its  
19 substance, and (e) the date the document was generated, prepared, or dated.

20 In re: Grand Jury Investigation, 974 F.2d at 1071.

21 In this case, AISLIC and Zurich have failed to provide Behr a log or index necessary to  
22 show the withheld documents or redactions meet the required elements of privilege, yet, they  
23 continue to claim their Objections satisfy their duty under Rule 45(d). See Grimm Declaration at  
24 50 (Handler’s Dec. 30 Ltr.) (“My client is in compliance with any and all of its duties pursuant to  
25 Rule 45(d).”); 56 (King’s Jan. 7 Ltr.) (“We remind you that Zurich filed its responses, including  
objections, pursuant to Federal Rule of Civil Procedure 45.”). The Objections, however, only

1 assert privilege in boiler-plate fashion. See Grimm Declaration at 15 (Objection to Subpoena of  
 2 AISLIC); 23 (Objection to Subpoena of Zurich). The Objections do not provide the document-  
 3 by-document detailed information required by Fischel and Dole. Accordingly, the Court should  
 4 compel AISLIC and Zurich to provide a log that allows Behr to evaluate claims of privilege.

5 **B. Behr's Request No. 2 Is Reasonable Because It Seeks Relevant**  
 6 **Information, Is Limited In Temporal Scope, And Seeks Specific**  
 7 **Categories Of Documents, Therefore AISLIC And Zurich's Claim**  
**That The Request Is Unduly Burdensome Must Fail**

8 The reasonableness of a subpoena is determined by the facts of a case. See Northrup v.  
 9 McDonnell Douglas Corp., 751 F.2d 395, 403 (D.C.Cir. 1985) (“What constitutes  
 10 unreasonableness or oppression is, of course, a matter to be decided in the light of all the  
 11 circumstances of the case.”) (citing Moore's Federal Practice). In evaluating the reasonableness  
 12 of a subpoena, courts look to factors such as: “[1] relevance, [2] the need of the party for the  
 13 documents, [3] the breadth of the document request, [4] the time period covered by it, [5] the  
 14 particularity with which the documents are described and [6] the burden imposed.” United  
 15 States v. International Business Machines Corp., 83 F.R.D. 97, 104 (S.D.N.Y. 1979) (hereinafter  
 16 “IBM”) (distilling these factors from numerous grand jury, administrative, and civil litigation  
 17 cases). In the case at bar, Behr's subpoena is reasonable.

18 Request No. 2 seeks relevant information that is necessary to Behr's prosecution of its  
 19 claims. Information sought in discovery is relevant if it “appears reasonably calculated to lead to  
 20 the discovery of admissible evidence.” Fed. R. Civ. Pro. 26(b)(1). Request No. 2, pertaining to  
 21 the business relationship between Behr's insurers—AISLIC and Zurich—and the defendants, is  
 22 relevant to Behr's cause of action against the defendant attorneys for Consumer Protection Act  
 23 violations. Behr's claims against defendant attorneys are based, in part, on the fact that the  
 24 defendant attorneys' first allegiance was to the Insurers, not to Behr; that the Insurer's billing  
 25 guidelines limited the quality of Behr's defense by the defendants; and that the defendants

1 provided the Insurers with Behr's attorney-client privileged information without seeking Behr's  
 2 consent. Materials relating to the business relationship between the defendants and AISLIC and  
 3 Zurich goes to the heart of the Consumer Protection Act claim. Therefore Request No. 2 is  
 4 relevant, reasonable, and necessary of Behr's prosecution of its claims.

5 Behr's Request No. 2, for documents relating to the business relationship between the  
 6 defendants and AISLIC and Zurich, also is narrow in breadth and with respect to the time period  
 7 covered. In particular, Behr is seeking documents only for the three-year period between the  
 8 filing of Smith in Washington Superior Court in 1998 and the withdrawal of Bullivant Houser  
 9 Bailey, P.C. on April 10, 2001. See Grimm Declaration at 63 (Schwab's Jan. 20 Ltr.). AISLIC  
 10 and Zurich have attempted to characterize Behr's request as unlimited. See Grimm Declaration  
 11 at 23 (Objection to Subpoena of Zurich) ("[I]t is not limited to any specific time period . . .").  
 12 But, as Behr's letter of January 20 clarifies, Behr is only seeking a limited group of documents  
 13 considering the long history behind this case.

14 Finally, Request No. 2 is not unduly burdensome for AISLIC and Zurich. "[T]he burden  
 15 of production must be compared with the size of and resources available to the responding  
 16 party." IBM, 83 F.R.D. at 108. AISLIC and Zurich, two of the largest insurance carriers in the  
 17 country, have enormous legal resources at their disposal, as evident by the numerous letters  
 18 written by AISLIC and Zurich's counsel, attached hereto, protesting Behr's reasonable document  
 19 requests. Therefore, given the resources of AISLIC and Zurich and the narrowly drawn scope of  
 20 Request No. 2, the Request does not unduly burden the insurers and is reasonable.

#### 21 IV. CONCLUSION

22 For over five months, Behr has attempted to obtain an adequate description of  
 23 subpoenaed documents under Request No. 2 that AISLIC and Zurich have refused to produce.  
 24 Those efforts have been unsuccessful. Behr respectfully requests that the Court now order  
 25

1 AISLIC and Zurich to produce privilege logs or other adequate descriptions of the documents  
2 they have withheld or redacted, so that Behr may evaluate privilege claims.

3 DATED this 29th day of January, 2004.

4 DORSEY & WHITNEY LLP

5  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 29, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Kelly P. Corr, Mark G. Honeywell, David P. Martin, and Timothy H. Butler.

I hereby certify that on January 29, 2004, I have mailed by United States Postal Service the document to the following non CM/ECF participants:

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